IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6527

JAMES INGRAHAM, by his mother and next friend, ELOISE INGRAHAM, *et al.*,

Petitioners,

v.

WILLIE J. WRIGHT, I, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the Court of Appeals, *en banc*, is reported at 525 F.2d 909. The original panel decision, which held in favor of the Petitioners, is reported at 498 F.2d 248. Copies of both opinions and the original

orders of dismissal entered by the United States District Court for the Southern District of Florida are reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1976. The Petition for Writ of Certiorari was timely filed. The Petition was granted on May 24, 1976. The jurisdiction of this Court is based upon Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

DOES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT APPLY TO THE ADMINISTRATION OF DISCIPLINE THROUGH SEVERE CORPORAL PUNISHMENT INFLICTED BY PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS UPON PUBLIC SCHOOL CHILDREN?

II.

DOES THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

. . . nor shall any state deprive any person of life, liberty or property without due process of law; . . .

STATEMENT OF THE CASE

Certiorari was granted in this case to review the *en banc* decision of the Court of Appeals, which held that *any* degree of corporal punishment inflicted upon public school students does not come within the scope of the Eighth Amendment protection, nor must the punishment be preceded by any procedural due process protections. The *en banc* majority reversed the original panel decision, which had concluded that the severity of punishment at one junior high school in the Dade County, Florida, Public School System violated the Eighth Amendment's prohibition against cruel and unusual punishment, and that some procedural safeguards must be utilized before meting out corporal punishment.

The view of the *en banc* majority was uncompromising. Its holding stands for the proposition that no matter how severe or brutal, punishment inflicted upon public school children by school officials is not banned by the Eighth Amendment. It also found that

physical punishment involved no deprivation of a right sufficient to activate the procedural guarantees of the Due Process Clause.

Certiorari was granted to review that decision.

This case originated in 1971 when the Petitioners, James Ingraham and Roosevelt Andrews, filed a three-count complaint in the United States District Court for the Southern District of Florida, seeking declaratory and injunctive relief against the use of corporal punishment in Dade County, Florida, public schools, and damages for personal injuries resulting from the corporal punishment administered to them by Respondents Wright, Deliford and Barnes (App. 1-10).[1] Ingraham and Andrews had been students at Charles R. Drew Junior High School. Wright was the Principal of the school, Deliford the Assistant Principal, and Barnes an Assistant to the Principal (App. 2).

The declaratory and injunctive relief was sought on behalf of a class, described by the District Court in its certification order as:

> All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board, with the exception of Miss Karen Grumwell, who specifically requested that she not be made a part of the class.
>
> (App. 19).

The equitable claims, which were contained in Count III of the Complaint (App. 6-8), were tried by the District Court Judge without a jury. At the close of the Petitioners' evidence, which consisted of documentary

[1] References to the Appendix denote that those portions of the voluminous trial record are included in the Joint Appendix submitted to the Court. Other references are to the original record, which has been filed with the Clerk.

evidence and the testimony of sixteen students, several parents and relatives of students, an educational psychology professor and a number of school teachers and administrators, the Respondents successfully moved for dismissal under Rule 41(b), Federal Rules of Civil Procedure.[2] The District Court Order of Dismissal found that "corporal punishment, inflicted in some of the schools of Dade County, may be harsh, oppressive and of doubtful propriety" (App. 154) and "may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting" (App. 154). Nevertheless, the Court concluded that:

> Considering the system as a whole, there is no showing of severe punishment degrading to human dignity, nor of the arbitrary infliction of severe punishment, nor of the unacceptability to contemporary society of corporal punishment in the schools, nor of excessive or disproportionately severe punishment.
>
> (App. 155).

[2] The pertinent portion of that Rule provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The District Court also found that no formal notice and hearing were required before inflicting corporal punishment with a wooden instrument known as a paddle (App. 155-156).

Thereafter, the parties agreed that the evidence offered to support the equitable claims, plus some additional stipulated testimony, should be viewed as the Petitioners' evidence in the damage claims (App. 147). The Court then considered a Rule 41(b) motion for a directed verdict on those claims, and granted the motion, stating:

> The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring "punishment" to the level of "cruel and unusual" punishment. Therefore a jury could not lawfully find that either of these plaintiffs sustained a deprivation of rights under the Eighth Amendment.

With the entry of those two orders (App. 147, 150), the entire case was dismissed. The Petitioners appealed.[3]

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[3] Although the named plaintiffs, Ingraham and Andrews, are no longer in school, this case is not moot. Their damage claims based upon violations of the Eighth and Fourteenth Amendments present a live controversy. In addition, the class members' right to injunctive relief against cruel and unusual punishment and violations of due process also survive. While an injunction is of no present value to the named plaintiffs, "This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class" *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11. This case shares each of the factors enumerated in *Gerstein v. Pugh* as reasons for finding that the issues were not moot.

The original Court of Appeals panel held that the District Court erred in dismissing the three counts. Their conclusion was based upon the finding that the punishment imposed upon students at the Drew Junior High School in Dade County, Florida, was so oppressive that it violated the Eighth and Fourteenth Amendments. *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974) (App. 158).

A Petition for Rehearing *en banc* was granted. Upon rehearing, the original panel decision was reversed, and the District Court Orders of Dismissal affirmed. *Ingraham v. Wright*, 525 F.2d 909 (1976) (App. 180). The granting of certiorari followed.

The issues presented by the *en banc* decision are raised by the exceptional facts of this case. Those facts reflect that at the Drew Junior High School in Miami, Florida, the Respondents engaged in a pattern and practice of inflicting repeated and continual bodily pain and injury upon thirteen, fourteen and fifteen-year-old junior high school students as a means of punishing them for alleged violations of myriad school rules. The punishment was effected by a "paddle," a flat wooden instrument, approximately two feet long (App. 146). As we argue in Point I, that repeated and continual punishment was so severe and excessive at Drew that it ran afoul of the prohibition against cruel and unusual punishments. And, in Point II, we contend that the imposition of any corporal punishment by an instrument designed to cause bodily pain results in a serious loss of liberty which requires some minimal due process protections.

The Petitioners do not attempt to characterize *all* corporal punishment inflicted upon public school

students as "cruel and unusual." Only the severe punishment which this record presents is claimed to be cruel and unusual. Nor do we urge that all corporal punishment must be preceded by informal due process procedures. Only summary punishment imposed by an instrument designed to cause bodily pain, like the paddle used by the Respondents, requires some due process protection.

Therefore, we turn to the facts, to the ambience of oppression at Drew Junior High School, which raises the Petitioners' constitutional claims.

STATEMENT OF THE FACTS

The authority for corporal punishment in Florida is found in Florida Statutes Section 232.27:

> *Authority of teacher*
>
> Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in nature.

The Dade County School Board implemented the Statute by promulgating School Board Policy 5144, authorizing corporal punishment and outlining the

procedures to be utilized in administering the punishment.[4] Under the color of the Statute and Policy 5144, the Respondents wielded their weapon upon:

A. JAMES INGRAHAM

On October 6, 1970, fourteen-year-old James Ingraham and some other students were allegedly slow in leaving the stage of the school auditorium. They were taken to the office of Respondent Wright, the Principal, to be paddled. James protested his innocence and refused to assume the paddling position. Respondents Barnes and Deliford were called in to assist (App. 72-73):

> Q . . . Then what happened?
>
> A . . . Then they grabbed me; took me across the table.
>
> Q Who were "they"?
>
> A Mr. Deliford, Mr. Barnes and Mr. Wright.
>
> . . .

---

[4] The policy and its subsequent revisions are contained in the Appendix, pp. 125-132. Both decisions below commented upon the Policies. 498 F.2d at 254-255, notes 5 and 7 (App. 162, 163); 525 F.2d at 916, n. 6 (App. 186). Because the *en banc* majority's opinion precludes all constitutional protections, no matter what the policies or practices may be, the Policies are superfluous and thus not reproduced here. It is interesting to note, however, that neither the statutory nor policy prohibitions against inflicting corporal punishment before consulting the Principal were effective. Of the 255 non-Principal paddlers in the Dade County Public Schools, 59, or over 23%, admitted they beat students without "regularly and routinely" conferring with their respective Principals. (Pl. Ex. 11, App. 142).

Q You say Mr. Barnes and Mr. Deliford did what?

A Put me across the table.

Q Show me how they did that.

A Like this here; across this way.

. . .

Let the record reflect the witness is lying prone, face down, across the table, with his feet off the floor.

Q Who held you there?

A Mr. Barnes and Mr. Deliford.

Q Who held what?

A Mr. Barnes held my legs and Mr. Deliford held my arms.

Q Who paddled you?

A Mr. Wright.

Q You said he was going to give you how many licks?

A Twenty.

Q How many did he give you?

A More than twenty.

. . .

Q Did it hurt?

A Yes, it hurt.

Q Did you cry?

A Yeah.

(App. 74-75).

The injury which that beating caused is pictured in the Appendix (App. 140).

After the paddling, James went home, notwithstanding Wright's admonition to wait outside the office: "[H]e said if I moved he was going to bust me on the

side of my head" (App. 75). His mother, recognizing the seriousness of the injury, sought medical treatment for him.

The injury was diagnosed to be a hematoma (App. 133). Pain and sleeping pills, a laxative, ice packs and a week at home were prescribed (App. 133-134). Several days after the paddling, another doctor found "serousness or fluid oozing from the hematoma" (App. 136), and on October 14, eight days after the incident, James was advised by his doctor to rest at home "for the next 72 hours." (App. 137). He was unable to sit comfortably for about three weeks (App. 78).

James attended Drew for only half of his eighth grade year (App. 67). He experienced one other paddling—a mass paddling inflicted upon a whole gym class for "talking" by a teacher who first put a leather glove on his hand so his hand "wouldn't sting when he hit you with the board." (App. 69).

B. ROOSEVELT ANDREWS

Roosevelt Andrews' tenure at Drew was twice as long as Ingraham's, but he received five times as many beatings. He was there for a year (App. 90) and was paddled about ten times (App. 99). Roosevelt had been a victim of the corporal punishment system in Dade County for some time. He had been paddled as early as the second and third grades, and in the fifth and sixth grades, he was paddled for tardiness, making noise and "messing around." (App. 90-93).

The summary punishment he suffered at Drew included a paddling for not having tennis shoes in gym class:

Q Why didn't you have any tennis shoes?

A Somebody stole them.

Q Why didn't you buy new tennis shoes?

A Because I didn't have no money.

Q Who paddled you then; Mr. Wright or Mr. Kemp? [The physical education teachers].

A Mr. Kemp.

Q Did you explain it to Mr. Kemp?

A Tried

Q What did he say?

A He said, "That ain't no excuse."

Q Did you tell him that you didn't have any money to buy new shoes?

A I ain't tell him I ain't got no money. I tell him I couldn't get none right now.

Q Do you live in a public housing project now?

A Yeah.

(App. 102-103).

Roosevelt was beaten by Respondent Deliford several times (App. 105) and Respondent Barnes, who nearly always carried a paddle with him (e.g., App. 80, 106; Tr. 476, 496-497), paddled Roosevelt four times within a twenty-day period (App. 106-107; Pl. Ex. 13, Tabs 8, 9, 10 and last page). One of the Barnes' beatings was a mass paddling in the bathroom. The charge was tardiness. Roosevelt claimed innocence. Nevertheless, together with fourteen or fifteen other boys, he was

compelled to lean against the urinals and, while some "hollering, cry, prayed and everything else [sic]" (App. 109), all were beaten.

Although Roosevelt's father angrily protested the punishment in a meeting with Wright, Deliford and Barnes, the Respondents were not inhibited (App. 111-113). Within the next ten days, Wright again paddled Roosevelt, striking him on the buttocks and the wrist, causing him to seek medical treatment and lose the full use of his wrist and arm for a week (App. 114-116).

C. REGINALD BLOOM

Reginald was paddled "about fifteen times in his three-years at Drew Junior High School (Tr. 490, 493). Some of these paddlings were for not having gym shorts. The fact that they had been stolen was no excuse (Tr. 494). But the worst whipping was inflicted by Deliford. He gave Reginald "fifty licks" with "a board" for allegedly making an obscene phone call to a teacher (Tr. 501, 524-525). The bruises caused him to seek medical attention (Tr. 510). He could not sit down for three weeks as a result of the injury (Tr. 509).

Reginald also told of Barnes' daily paddlings of students, sometimes for "a shirttail hanging out," sometimes for "chewing gum" (Tr. 521).

D. DONALD THOMAS

Donald received between five and ten paddlings from Barnes under a unique system. The seats in the auditorium at Drew were numbered, and if a student allegedly misbehaved, his number was written on the blackboard by a teacher. Barnes would walk in the auditorium, call out the numbers and administer four or five licks of the paddle to five to eight students daily (Tr. 423-425).

E. RODNEY WILLIAMS

Rodney was one of the victims of the auditorium number system. He had been paddled "plenty of times" at Drew (Tr. 600), but because he stood up in his seat to wipe off some grease, his number went up, and he received a memorable whipping. He recalled the event:

> So he [the teacher] put my number on the board. So when Mr. Barnes came, he asked for me and took me to the office and told me to hook up.
>
> Q What did he mean by "hook up"?
>
> A Grab a chair, you know. The chair, he mean by hooking up on the chair.
>
> Q In preparation to being paddled.
>
> A So I refuse. I told him, I say, "Mr. Barnes, I didn't do nothing; that's why I refuse not to take a whipping."
>
> Q What did he do?

> A So he told me, say, "You are going to take this one."
>
> I said, "Mr. Barnes, I didn't do nothing. I'm not taking no whipping."
>
> So I was leaning over the table and I said, "I'm not taking a whipping," and I was hit across the head with the board. He was hitting me across the head with the board, and my back and everything.
>
> Q He was whipping you where?
>
> A Across the head, with the board. He was hitting me all across the head and on the back. I was begging him for mercy to stop and he wouldn't listen.
>
> So he had some chairs in there and I was falling in the chairs as he was hitting me with the board.
>
> Then after a while he took off his belt and then started to hit me with the belt and hit me with the buckle part, and tears was coming out of me.
>
> (Tr. 594-595).

Two or three days later Rodney's head became swollen. He was anesthetized and a protuberance of some sort was lanced. "Pus and water and blood shot out." Rodney was out of school for a week and was left with a permanent record of the incident--a half-inch scar on the side of his forehead (Tr. 596-597). Two other paddlings caused him to cough up blood (Tr. 601, 604).

F. DANIEL LEE

Daniel suffered a permanent injury which the District Court described. Observing his hand, the District Judge said: "It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree" (Tr. 483). He received that when he did not acquiesce to getting "a little piece of the board" (Tr. 480):

Q Are you telling the Court that Mr. Barnes hauled off and deliberately hit you on the hand?

A Yes, sir; because he tried to throw me against the chair, you know, and I wouldn't get over there and so he grabbed me and hit me on the hand with the board.

He was trying to hit you on the rear end, wasn't he?

A No.

Q Are you saying he deliberately hit you on the hand?

A Yes, sir.

(Tr. 487-488).

G. LARRY JONES

Larry was paddled "a heap of times . . . around about 10" (Tr. 648). He received seven licks (Tr. 650), five licks (Tr. 653), ten licks (Tr. 655), and "two knots on my head" for not wanting a beating (Tr. 651).

H. JANICE DEAN

Severe corporal punishment at Drew was not limited to boys. A woman physical education teacher paddled Janice and forty other girls because a girl's money was stolen (Tr. 809). Deliford gave Janice "five licks" on her first day at Drew because she sat in the wrong auditorium seat. The punishment was inflicted in front of a class of 300 students (Tr. 815-816). Wright gave her and four other girls three licks for allegedly hollering in the hall (Tr. 821-822). Barnes gave Janice fifteen licks after she had been sent to his office by the typing teacher. He had no idea what she had allegedly done, only that Janice and some other students "had done something wrong or we wouldn't have been there." (Tr. 817-820).

This is a unique case. There cannot be many schools which have suffered the kind of despotism which existed at Drew Junior High School. The atmosphere of oppression was created by more than the paddle. Several witnesses testified that they saw Barnes and Deliford with brass knuckles (Tr. 328, 449, 655). Thankfully, those instruments were not used to inflict punishment, but their mere presence underscores the potential danger of the *en banc* majority decision, allowing constitutional leeway to any corporal punishment visited upon students, no matter how brutal.

The corporal punishment reflected by this record was severe and summary. For the reasons which we set

forth below, we contend that the punishment inflicted upon the students at Drew Junior High School under color of state law violated the Eighth and Fourteenth Amendment rights of the Petitioners and the class they represent.

SUMMARY OF ARGUMENT

I.

THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT APPLIES TO PUBLIC SCHOOL CHILDREN. THE SEVERE CORPORAL PUNISHMENT INVOLVED IN THIS CASE VIOLATES BOTH THE CONTEMPORARY VALUES AND HUMAN DIGNITY TESTS OF THE EIGHTH AMENDMENT.

A. "School officials do not possess absolute authority over children." *Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969). Students are entitled to the protections of the Constitution, and they do not lose their fundamental constitutional rights when they enter the "schoolhouse door." *Goss v. Lopez*, 419 U.S. 565, 574 (1974).

One of the fundamental rights guaranteed by the Fourteenth Amendment is the right to be free from cruel and unusual punishments. *Gregg v. Georgia*, ____ U.S. ____, 44 L.W. 5230 (July 2, 1976). That freedom is not limited to punishments imposed upon persons convicted of crimes. If that theory were adopted, public school children could be savagely beaten by their

teachers under color of state law and be without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers would have constitutional claims. It is inconceivable that the drafters of the Eighth Amendment intended to rule out the rack and screw for criminals, but not for school children.

While the enactment of the cruel and unusual clause was aimed at proscribing barbarous methods to punish crime, the drafters could not have envisioned the expansion of governmental services and regulations giving rise to the opportunities for punishment unknown in 1791. Our present public education system began in the 1850's, long after the adoption of the Eighth Amendment. Attempting to limit it to criminal punishments ignores the dynamic approach this Court had taken in interpreting the Eighth Amendment:

> . . . a principle to be vital must be capable of wider application than the mischief which gave it birth.
>
> *Weems v. United States*, 217 U.S. 349, 373 (1910).

The punishments meted out to the Petitioners and their class were "penal" as defined in *Trop v. Dulles*, 356 U.S. 86, 96 (1958). The School Board Policy described it as the "inflicting of a penalty for an offense" (App. 126). Attaching a civil or criminal label is meaningless. Cf. *In re Gault*, 387 U.S. 1, 17 (1969). Two courts of appeal have concluded that students as well as criminals are protected by the Eighth Amendment. *Bramlett v. Wilson*, 495 F.2d 714 (8th Cir. 1974), and *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974). Any other conclusion creates an intolerable

constitutional incongruity, giving criminals more protection than children from abuses at the hands of persons acting under color of state law.

B. While ten states specifically permit corporal punishment by statute, no state condones severe corporal punishment–the repeated and continued inflicting of bodily pain by an instrument designed to cause such pain. Thus, while there may be a degree of public tolerance for some corporal punishment upon school children, it is clear that contemporary values reflect that the sanction of severe corporal punishment is morally objectionable.

Therefore, under the contemporary values test, *Gregg v. Georgia*, 44 L.W. at 5235, the severe punishment inflicted upon the students at Drew Junior High School was cruel and unusual and violated the Eighth Amendment.

C. The penalties imposed at Drew involved "the unnecessary and wanton infliction of pain" and were "grossly out of proportion to the severity" of the offenses allegedly committed by the Petitioners and their class. Therefore, they were excessive under the test applied in *Gregg v. Georgia*, 44 L.W. at 5236.

Any nontraditional penalty is constitutionally suspect as excessive. *Trop v. Dulles*, 356 U.S. at 100. In a school setting, suspensions, expulsions and keeping students after class are "traditional means" for maintaining discipline. *Goss v. Lopez*, 419 U.S. 565, at 591 (Powell, J., dissenting). The continual infliction of bodily pain by an instrument designed to cause such pain is not traditional. It is an affront to human dignity. It can be justified only if some compelling or

rational governmental interest is served by it. There is a valid societal purpose for imposing the ultimate form of corporal punishment–death–for the ultimate atrocity–murder. But severe corporal punishment serves no societal purpose. No respected authority believes that the infliction of such punishment accomplishes valid educational goals.

The Court has made it apparent that even for the most heinous violation of a social norm, an extraordinary penalty must be shown to accomplish its task of promoting stability in a society governed by law. *Gregg v. Georgia, supra.* Since there can be no similar showing with respect to the kind of punishment presented in this case, the Petitioners' Eighth Amendment rights were breached.

II.

THE INFLICTION OF ANY BODILY PAIN UPON PUBLIC SCHOOL CHILDREN BY AN INSTRUMENT DESIGNED TO CAUSE SUCH PAIN DEPRIVES STUDENTS OF RIGHTS TO LIBERTY GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS. SOME MINIMAL DUE PROCESS PROTECTIONS MUST PRECEDE THE IMPOSITION OF THAT KIND OF CORPORAL PUNISHMENT.

A. The right to liberty is broad. It at least means the right to be free from "bodily restraint" and the right to enjoy "privileges long recognized as essential to the orderly pursuit of happiness by free men." *Meyer v.*

Nebraska, 262 U.S. 390, 399 (1923). The right to be free from unjustified physical assaults under color of state law fits that definition. The Fourth Amendment's "overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the state." *Schmerber v. California*, 384 U.S. 757, 767 (1966). The corporal punishment inflicted in this case caused physical, emotional and reputational injuries. "Liberty" as a broad concept, or as a Fourth Amendment concept, was lost by the Petitioners and their class. To the extent that the physical injuries caused some students to miss school, those students lost property rights as surely as did the students in *Goss v. Lopez*, 419 U.S. 565 (1975). The threatened loss of those rights activates the protections of the Due Process Clause.

B. The District Court and the *en banc* majority were wrong in viewing due process procedures in a school setting as having to be "elaborate" or "formal." The minimal, informal requirements for notice and an opportunity to be heard outlined in *Goss v. Lopez*, 419 U.S. 565 (1975), are sufficient to protect students faced with corporal punishment by an instrument. The Dade County School Board Policy and an Opinion of the Attorney General of Florida already envision some delay between the offense and punishment. The School Board mandates an effort to analyze the effectiveness of the punishment and to consult with psychologists or physicians (App. 130, 132). Attorney General's Opinion 074-256 states that a teacher must consult with a principal before corporal punishment is imposed. Within that time, providing informal notice of the reasons for

the threatened punishment and an opportunity to be heard are reasonable due process requirements which will not disrupt school functions.

III.

NEITHER THE AVAILABILITY OF STATE REMEDIES, NOR *PAUL V. DAVIS*, ____ U.S. ____ (1976), BARS RELIEF IN THIS CASE.

Monroe v. Pape, 365 U.S. 167, 183 (1961), makes it clear that when one is claiming a denial of a specific constitutional right, state remedies need not be invoked. The Petitioners in this case are claiming denials of rights explicitly protected by the Fourth and Eighth Amendments. Therefore, they come within the scope of the *Monroe v. Pape* doctrine.

In *Paul v. Davis*, ____ U.S. ____ 47 L.Ed.2d 405 (1976), no fundamental constitutional rights were involved. Davis' claim was based on an alleged loss of liberty (his interest in not being defamed) absent a hearing. But there is no specific constitutional prohibition against defamation. There are such prohibitions against cruel and unusual punishment and the right to physical integrity. Therefore, *Monroe v. Pape*, not *Paul v. Davis*, controls the Petitioners' right to demand federal relief for the deprivation of their constitutional rights by persons acting under color of state law.

ARGUMENT

I.

THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Eighth Amendment Applies to Public School Students Punished By School Officials.

We begin with this principle:

> In our system, State-invented schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over children. Students in school as well as out of school are "persons" under the Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.
>
> *Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969).

One of the fundamental rights which the State must respect is the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments." *Robinson v. California*, 370 U.S. 660 (1962); *Gregg v. Georgia*, ____ U.S. ____, 44 L.W. 5230 (July 2, 1976). Entering the "schoolhouse door" does not strip students of their constitutional rights, *Goss v. Lopez*, 419 U.S. 565, 574 (1974), for the Fourteenth Amendment protects them, like every citizen, against

the State and all of its creatures--"Boards of Education not excepted." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

However, the Court below refused to offer students Eighth Amendment protection under any circumstances, concluding that the Amendment's application was limited to punishment invoked as a sanction for criminal conduct and was inapplicable to corporal punishment inflicted in public schools. That decision created this anomalistic result: public school children may be savagely beaten and whipped by teachers acting under color of state law, yet they will have no constitutional redress. But hardened criminals suffering the same beatings at the hands of their jailers will have constitutional claims. Neither the Constitution nor common sense condones that conclusion.

"The history of the [cruel and unusual] clause establishes that it was intended to prohibit cruel punishments." *Furman v. Georgia*, 408 U.S. 238, 322 (1972) (Marshall, J., concurring). With one exception, *Trop v. Dulles*, 356 U.S. 86 (1958), the Court's review of Eighth Amendment claims has come in cases involving punishment imposed by the criminal justice system. *Gregg v. Georgia*, ____ U.S. ____, 44 L.W. 5230 (July 2, 1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Weems v. United States*, 217 U.S. 349 (1910); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1879). But that does not mean that the Eighth Amendment offers no protection to those punished by other state authorities.

The sketchy history of the cruel and unusual punishment clause's enactment indicates it was aimed at proscribing torture and barbarous methods to force confessions and punish crimes. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Cal.L.Rev. 839, 842 (1969). The drafters could not have envisioned the expansion of governmental services and regulations giving rise to opportunities for punishments unknown in 1791. They could not have known that a century and a half later this Court would recognize that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). It was not until the mid-1800's that the framework of our present public education system was born, long after the clause was incorporated into the Constitution. 7 Encyclopedia Britannica, *History of Education*, 991, 992 (1970). So it is impossible to say, as did the opinion below, that the proponents of the clause ruled out the rack and screw for criminals but not for schoolchildren. That position ignores the dynamic approach this Court has taken in interpreting the Eighth Amendment:

> . . . a principle to be vital must be capable of wider application than the mischief which gave it birth.
>
> *Weems v. United States*, 217 U.S. 349, 373 (1910).

The Court's decisions reflect that precept. "Thus the clause forbidding 'cruel and unusual' punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane

justice." *Gregg v. Georgia*, ____ U.S. ____, 44 L.W. at 5235, citing *Furman v. Georgia*, 408 U.S. at 429-430 (Powell, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 100-101 (plurality opinion).

In *Trop v. Dulles*, the Court found that stripping a convicted Army deserter of his citizenship, pursuant to Section 401(g) of the Nationality Act of 1940, was a penal act barred by the cruel and unusual punishment clause. Trop had been found guilty of desertion in 1944, sentenced to three years at hard labor, a dishonorable discharge and forfeiture of all pay. In 1952 he was denied a passport because of his conviction for wartime desertion. He instituted an action seeking a declaratory judgment that he was a citizen. *Id.* 356 U.S. at 88. In order to determine if the Eighth Amendment applied, the Court first had to decide if the statute withholding citizenship was "penal." Trop had already served his court martial sentence. The citizenship denial was imposed by "civil" authorities. The Court set this standard for determining "penal":

> If the statute imposes a disability for the purposes of punishment–that is to reprimand the wrongdoer, to deter others, etc., it has been considered penal.
>
> *Id.*, 365 at 96.

A second criteria hinged upon the statute "prescrib[ing] the consequence that will befall one who fails to abide" by its regulatory provisions.

By finding the sanction of Section 401(g) to be penal, and deciding that the punishment, though involving no physical mistreatment or torture, offended

the Eighth Amendment, the Court rejected the kind of static scope which the Court of Appeals applied in this case.

The punishment meted out to the Petitioners and their class was certainly "penal." The School Board Policy described it as the "inflicting of a penalty for an offense." (App. 126). Attaching a "criminal" or "civil" label is meaningless. Cf. *In re Gault*, 387 U.S. 1, 17 (1969). The fallaciousness of such a distinction is understood by the fact that some of the most grievous paddling befell one student (Reginald Bloom) who received fifty licks for allegedly making an obscene telephone call (Tr. 501, 509, 525). Obscene calls are misdemeanor violations under Florida Statutes Section 365.16. Bloom was punished by state authority for that offense in a way which would have been unconstitutional had he been convicted of the crime. Compare, *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), in which ten lashes with a strap were deemed to exceed Eighth Amendment tolerances:

> . . . we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.
>
> *Id.* 404 F.2d at 579.

Yet the decision below mandates the constitutional incongruity of Reginald Bloom receiving five times the punishment of the Arkansas prisoners without any of their constitutional protections.[5] The Eighth Circuit, in *Bramlett v. Wilson*, 495 F.2d 714, 717 (8th Cir. 1974), rejected that position, finding that "an excessive amount of physical punishment could be held to be cruel and unusual punishment." The Seventh Circuit also rejected it. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974). While *Nelson* involved corporal punishment used in a state correctional school, one-third of whose students were non-criminal offenders, the court drew no distinction between the residents when it decided that the Eighth Amendment offered protection against severe corporal punishment. Several other federal courts have assumed, without deciding, that the Eighth Amendment applies to the imposition of corporal punishment in public schools. *Baker v. Owen*, 395 F. Supp. 294 (M.D. N.C. 1975), aff'd ____ U.S. ____, 96 S.Ct. 210 (1975); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), aff'd *per curiam* 458 F.2d 1360 (5th Cir. 1972); *Whatley v. Pike County Board of Education*, Civil Action No. 977 (N.D. Ga. 1971) (three-judge

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[5] Cf. *In re Gault*, 387 U.S. 1, 47 (1967): "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals, but not to children." The ironies abound. Before Gerald Gault could receive *any* punishment for the obscene telephone call he allegedly made, he was held to be entitled to counsel, notice of the charges and an opportunity to confront his accuser. However, Reginald Bloom received summary punishment at the hands of the school authorities. Punishment which was undeserved since another boy later confessed to making the call (Tr. 503-504).

court); *Sims v. Board of Education*, 329 F. Supp. 678 (D. N.M. 1971); and *Roberts v. Way*, 398 F. Supp. 856 (D. Vt. 1975).[6]

The assumption of those courts is correct. Over one hundred years ago the Supreme Court of Indiana declared:

> The public seem to cling to the despotism in the government of schools which has been discarded everywhere else. . . . The husband can no longer moderately chastise his wife; nor . . . the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy . . . should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.
>
> *Cooper v. McJunkin*, 4 Ind. 290, 291, 293 (1853).

The Fifth Circuit's absolute exclusion of public school students from constitutional protection against any barbarity is inexplicable. It is not supported by history, logic or precedent. Since the Eighth Amendment must offer *some* protection to the Petitioners, the issue to be resolved is whether the punishment applied in this case exceeds that which is tolerable under the cruel and unusual clause.

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[6]Two courts have held that the Eighth Amendment does not apply to corporal punishment in public schools. *Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1974), aff'd ____ F.2d ____ (6th Cir., June 15, 1976), and *Gonyaw v. Gray* 361 F.Supp. 366 (D. Vt. 1973).

B. The Severe Corporal Punishment Applied in This Case Violated the Contemporary Values Test of the Eighth Amendment.

In order to determine if a punishment is cruel and unusual, the Court has assessed "contemporary values concerning the infliction of a challenged sanction," looking to "objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia*, ____ U.S. ____, 44 L.W. at 5235.

While this case involves the imposition of *severe* corporal punishment,[7] we first consider the public tolerance for any corporal punishments imposed upon public school students as measured by legislative pronouncements which reflect the particular jurisdiction's "moral consensus" concerning such punishment and its "social utility as a sanction." *Id.* 44 L.W. at 5240.

Only ten states specifically permit corporal punishment.[8] At least twenty-three states give teachers the same authority as a parent to discipline a child, or authorize the teacher to maintain order and discipline

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[7]The definition of "severe" is drawn from the facts of this case. It means the repeated and continued infliction of bodily pain by an instrument designed to cause such pain.

[8]The 1972 National Education Association "Report of the Task Force on Corporal Punishment," p. 24-A, notes, without listing the states, that thirteen states specifically permit corporal punishment. Our research has discovered these ten specific corporal punishment statutes: Cal. Educ. Code §10854 (West 1975); Del. Code Ann., ch. 14 §701 (1974); Fla. Stat. Ann. ch. 232 §27 (1961); Ga. Code Ann. ch. 32 §835 (1976); Md. Code Ann. ch. 77 §98B (1976); Nev. Rev. Stat. Ann. ch. 392 §465 (1976); Ohio Rev. Code Ann. ch. 3319 §41 (1962); S.C. Laws Ann. ch. 21 §776 (Cum. Supp. 1975); Vt. Stat. Ann. ch. 16 §1161 (1971); Vr. Code Ann. ch. 22 §231.1 (1974).

in the classroom.[9] Two states expressly prohibit corporal punishment in public schools.[10] Some large city school boards have, by local rule, banned it. See National Education Association "Report of the Task Force on Corporal Punishment," p. 25-A (1972).

Thus, unlike the clear legislative endorsement of capital punishment by at least thirty-five states and the United States, *Gregg v. Georgia*, ____ U.S. ____ 44 L.W. at 5237-5238, n. 23 and 24, the public seems ambivalent about *any* corporal punishment imposed upon students.

There can be no dispute, however, that society is totally unaccepting of *severe* corporal punishment inflicted upon public school children. No statute or rule authorizes the kind of punishment endured by the

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[9] Ala. Code Ann. ch. 52 §1(9) (1973); Ariz. Rev. Stat. Ann. ch. 15 §201 (1974); Ark. Stat. Ann. ch. 80 §1629 (1967); Conn. Gen. Stat. Ann. ch. 53a §18 (1972); Hawaii Rev. Stat. Ann. ch. 298 §16 (Supp. 1975); Idaho Code Ann. ch. 33 §1224 (1948); Ill. Ann. Stat. ch. 122 §24-8 (1971); Ind. Stat. Ann. tit. 20 art. 8.1 ch. 5 §1 (1974); Ky. Rev. Stat. Ann. ch. 161 §180 (1969); La. Stat. Ann. ch. 17 §223 (1965); Me. Rev. Stat. Ann. tit. 20 ch. 105 §911-915 (1965); Mich. Stat. Ann. ch. 340 §756 (1972); Neb. Rev. Stat. Ann. ch. 79 §311 (1964); N.Y. Penal Law §35.10 (McKinney 1975); N.C. Gen. Stat. Ann. ch. 115 §146 (1972); Okla. Stat. Ann. ch. 6 §114 (1969); Ore. Stat. Ann. ch. 161 §205; Pa. Stat. Ann. tit. 24 ch. 13 §1317 (Supp. 1976); S.D. Com. Laws Ann. ch. 13 §32-2 (1967); Tex. Codes Ann. Penal Code §9.62 (1974); Wash. Rev. Code Ann. tit. 9 ch. 11 §040 (1961); W.Va. Code Ann. ch. 18A §5-1 (1975); Wyo. Stat. Ann. ch. 21.1-64 (Supp. 1973).

[10] Mass. Ann. Laws, Ch. 71, §37G (Supp. 1974); N.J. Stat. Ann., §18A: 6-1 (1968).

Petitioners and their class.[11] No legislature has authorized the imposition of penalties like twenty brutally hard strokes with a paddle for tardiness in leaving a school auditorium (App. 72-74); or the mass paddling of fifteen boys in a bathroom for being late to class or other minor transgressions (App. 107-110); or constant paddling for sitting in the wrong auditorium seat (Tr. 819). Those penalties are both inhumane and disproportionate to the offenses involved. The record in this case is replete with instances of conduct which

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[11] Florida Statute Section 231.09(3) admonishes teachers to:

> Treat pupils under their care kindly, considerately, and humanely, administering discipline in accordance with regulations of the state board and the school board; provided, that in no case shall cruel or inhuman punishment be administered to any child attending the public schools.

As one commentator has pointed out:

> . . . the right of the teacher to administer punishment for the preservation of order and discipline in the school is undoubted under the common law but whether the necessity for the punishment existed and whether the mode and degree of punishment were reasonable are questions for the trier of facts to decide.
>
> Proehl, *Tort Liability of Teachers*, 12 Vand. L. Rev. 723, 737 (1959) (footnote omitted).

The use of excessive force in punishing a student could give rise to state civil and criminal litigation against the teacher. The availability of those remedies does not obviate a constitutional claim. *Monroe v. Pape*, 365 U.S. 167, 183 (1961):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked.

Because we anticipate that the Respondents will make an "adequate state remedy" argument, we treat this point more fully in Point III, *infra*. It is enough to say here that severe corporal punishment is beyond the pale of contemporary values.

violates the standards of decency tolerated by society. Beatings requiring medical treatment (App. 133) and causing the injured person to be unable to sit comfortably for three weeks (Tr. 149, 509), or to miss school for two weeks with an injured hand (Tr. 519-520), would be obnoxious to societal values even if inflicted by a parent.

For example, see Florida Statutes Section 827.03(3), which makes malicious punishment of a child a second degree felony, and Section 827.07, which defines "abuse" to include "any willful or negligent acts which result in . . . unreasonable physical injury" to children. Those statutes are part of a nationwide movement to protect the young from abuse by all adults, including their parents. It is obvious that the *"in loco parentis"* concept, which has provided the historical authority for teachers to impose some punishment, offers no protection to a teacher for acts which exceed parental authority.[12]

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[12]The common law doctrine of *in loco parentis* recognized a partial delegation of parental authority to the teacher. 1 *Blackstone Commentaries on the Laws of England*, 453 (T. Cooley ed. 1884). But the theory has limitations. The doctrine:

> ". . . was enunciated by Blackstone at a time when a child had one tutor. The tutor could logically be considered as acting in place of the parent, because the parent selected him and expected him to have a long and close relationship with the child. Far from delegating their authority to the schools, parents now are required by law to send their children to school, whether they want to or not. And the teacher no longer has a close extended relationship with the individual child. In addition to being based on an obsolete relationship, *in loco parentis* has become a ra-

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But more importantly, when a teacher, acting under color of state law, inflicts severe punishment, that penalty is being imposed by the state itself. A constitutional inquiry is triggered, requiring the assessment of contemporary values. *Gregg v. Georgia, supra.* While it may be premature to conclude that *all* corporal punishment violates those values, it is apparent that the repeated and continued infliction of bodily pain upon thirteen, fourteen and fifteen-year-old children surpasses contemporarily tolerated notions of punishment. The Respondents inflicted that kind of punishment upon the students at Drew Junior High School. It was arbitrary, capricious and wantonly and freakishly imposed. Cf. *Furman v. Georgia,* 408 U.S. 238, 309-310. It was cruel and unusual and violated the Eighth Amendment.[13]

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> tionale for actually curtailing the right of parents to make decisions about their children. In many cases, parents have brought suit against schools that were acting "in their place" but against their wishes. Gradually, *in loco parentis* is being replaced by state statutes and Constitutional principles as guides for the school's treatment of children.
>
> "Report of the Task Force on Corporal Punishment," National Education Association, 24-A (1972).

[13]The difficulty inherent in tolerating any corporal punishment was addressed in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968):

> We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. . . . Rules in this area seem often to go unobserved. . . . Regulations are easily circumvented. . . . Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. . . . Where power to punish is granted to

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C. The Severe Corporal Punishment Inflicted Upon the Petitioners Violated the Concept of Human Dignity Embodied in the Eighth Amendment.

In addition to violating "public perceptions of standards of decency," *Gregg v. Georgia,* 44 L.W. at 5235, the punishment used in this case was also contrary to other Eighth Amendment review standards:

> A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles, supra,* at 100 (plurality opinion). This means, at least, that the punishment not be "excessive."
>
> *Id.* 44 L.W. at 5236.

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> persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power.... There can be no argument that excessive whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?
>
> *Id.* 404 F.2d at 579-580.

These arguments strongly support a total ban on corporal punishment as the only effective way of insuring Eighth Amendment protections. See also 6 Harv. Civ. Rights-Civ. Lib. L. Rev., *Corporal Punishment in the Public Schools*, 583, 585 (1971):

> While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were

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The excessiveness which concerned the English framers of the original cruel and unusual punishment clause reflected their

> ... objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court and ... a reiteration of the English policy against disproportionate penalties.
>
> Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning,* 57 Cal.L.Rev. 839, 865 (1969).

The punishment of the sentencing court at Drew Junior High School was prohibited by Florida Statutes Section 231.09(3), outlawing "cruel and inhuman punishment" in the public schools. It was also disproportionate. The argument is made stronger by analyzing the penalties imposed at Drew Junior High School under the "excessiveness" criteria set forth in *Gregg v. Georgia:*

> First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman v. Georgia, supra,* at 392-393 (Burger, C.J., dissenting). See *Wilkerson v. Utah,* 99 U.S., at 136; *Weems v. United States,* 217 U.S., at 381. Second,

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> permitted, controls would be unlikely to prevent the "really unmistakable kind of satisfaction which some teachers feel in applying the rattan."[19] A total ban of this punishment would provide far more effective control.[20]

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[19] J. Kozol, Death at an Early Age, 16-17 (1967).

[20] A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added case of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained.

> the punishment must not be grossly out of proportion to the severity of the crime. *Trop v. Dulles, supra,* at 100 (plurality opinion) (dictum); *Weems v. United States, supra,* at 367.
>
> *Id.* 44 L.W. at 5236.

We begin with the proposition that:

> Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.
>
> *Trop v. Dulles,* 356 U.S. at 100.

In a school setting, "Suspensions are one of the traditional means–ranging from keeping a student after class to permanent expulsion–used to maintain discipline in the schools." *Goss v. Lopez,* 419 U.S. 565 at 591 (Powell, J., dissenting). Thus, it is non-physical punishment which is customarily imposed. Even if some of the alleged offenses which precipitated the beatings at Drew (Reginald Bloom's alleged obscene phone call, for instance) had been tried in criminal or juvenile court, they could have resulted only in the non-physical penalties of fine or imprisonment. Corporal punishment in either the school or the criminal justice system would be non-traditional. But even if we stretch the point of tradition a bit to embrace some corporal punishment, in deference to the Respondents' concession that "corporal punishment in the public schools of Dade County, Florida is a last resort means as an alternative to suspension or expulsion. . . ." (Brief of Respondents in Court of Appeals, p. 17, 498 F.2d at 267; 525 F.2d at 925), nothing supports the notion that severe corporal punishment is traditional.

Severe corporal punishment is an extreme sanction, justified only for some extreme offense, if it is permissible at all. To determine whether it may be licensed, we look to the death penalty cases. Since capital punishment is the ultimate form of corporal punishment, the circumstances which authorize the death penalty shed light on what, if anything, allows the imposition of severe corporal punishment upon youngsters.

The Court noted in *Gregg* that "the sanction cannot be so totally without penalogical justification that it results in the gratuitous infliction of suffering." It concluded in the death penalty cases[14]:

> . . . we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.
>
> *Gregg v. Georgia,* 44 L.W. at 5240 (footnote omitted).

In other words, the infliction of the extreme version of corporal punishment was tolerable because it punished the commission of the ultimate atrocity–murder. Therefore, the suffering was not gratuitous. It served a valid societal purpose.

Corporal punishment in any other form is, according to *Trop v. Dulles,* "constitutionally suspect." To justify its imposition, the state must show a "compelling

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[14] *Gregg v. Georgia,* ____ U.S. ____ (1976); *Profitt v. Florida,* ____ U.S. ____ (1976); *Jurek v. Texas,* ____ U.S. ____ (1976); *Woodson v. North Carolina,* ____ U.S. ____ (1976); *Roberts v. Louisiana,* ____ U.S. ____ (1976).

[societal] interest." Cf. *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Oyama v. California,* 322 U.S. 633, 644-646 (1948); *Shapiro v. Thompson,* 394 U.S. 618, 638 (1968).[15]

Can there be any governmental interest rationalizing the corporal punishment procedures utilized at Drew Junior High School? According to the School Board Policy, any corporal punishment is a "penalty" which attempts to maintain discipline by "changing the behavior of the student" (App. 126). There is evidence that it accomplishes none of those goals:

> I can't think of a renowned or leading authority in psychology, educational psychology, educational research, psychiatry who advocates corporal punishment in schools.
>
> Testimony of Dr. Scott Kester (Tr. 756, 766-767).

The National Education Association "Task Force Report on Corporal Punishment" concludes, *inter alia,* that it is an inefficient way to maintain order; that it may increase disruptive behavior; that it hinders learning. After examining "all the reasons it could identify for the use of corporal punishment in both oral and written materials," the Task Force found "that the weight of fact and reasoning was against the infliction

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[15]Those cases impose the compelling interest test upon classifications based on race or national origin or those which infringe upon fundamental constitutional rights. Since the Eighth Amendment is such a right, and since the classification here (corporal punishment) has been viewed as "non-traditional" and "suspect," we contend the compelling interest test must be similarly applied in this context.

Even if the lesser "rational basis" test is applied, the repeated beatings which form the basis of this constitutional claim do not pass constitutional muster.

of physical pain as an attempt to maintain an orderly learning climate." Report, *supra,* at p. 7-A.[16]

Even if we assume that there is some valid reason to paddle, certainly the repeated whippings of Ingraham, Andrews, Bloom and the other Drew students was more than retribution, more than they "deserved." Cf. *Furman v. Georgia,* 408 U.S. at 308 (Stewart, J., concurring). Nor can one say that only such harsh measures would deter future misconduct or maintain discipline. That argument is specious in light of the fact that innocent conduct, more than culpable conduct, prompted the harsh vengeance of the school administration.[17]

The repeated and continued imposition of bodily pain upon the Petitioners and their class was totally without penalogical or educational justification. It resulted in the gratuitous infliction of suffering. No societal purpose was served. This Court made it clear that even for the most heinous violation of a social norm, an extraordinary punishment must be shown to accomplish its task of promoting stability in a society governed by law. *Gregg v. Georgia, supra.* There can be

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[16]We are not concerned here with the need to use physical force to protect person or property from imminent harm. That force is not "punishment" and its utility is recognized by all educators. See "Model Law Outlawing Corporal Punishment," "Report of the Task Force on Corporal Punishment," National Education Association, 29-A (1972).

[17]Among the most distressing examples were the beatings inflicted for not dressing properly for gym because the student's gym shorts had been stolen (Tr. 493-494). No amount of paddling could cure that violation of the school dress code. The undressed student became a double victim. His shorts were lost and his buttocks assaulted. Even if a student was too poor to afford the proper clothing, he was paddled (App. 102-103; Tr. 546-548, 588-591).

no such showing in this case. Therefore, the severe corporal punishment inflicted upon these Petitioners and their class violated the Eighth Amendment.[18]

II.

THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND SOME OPPORTUNITY TO BE HEARD VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Protected Right.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that an Ohio Statute which authorized suspension of public school students for up to ten days, without notice of their alleged offenses and an opportunity to be heard, violated the students' rights to procedural due process under the Fourteenth Amendment. The Court found that the students had a substantial property right

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[18]Since the repeated and continued infliction of bodily pain by an instrument designed to cause such pain is *per se* unconstitutional, we need not address the lack of standards governing the imposition of corporal punishment. Neither the School Board Policy nor the Florida Statute offer directions which suitably direct and limit the instances of any corporal punishment, other than the Board requirement that it be administered with "kindness" (App. 129) and the statutory prohibition against "cruel and inhuman" treatment. Florida Statute Section 231.09(3). Those failures would raise serious questions under *Furman v. Georgia*. See *Gregg v. Georgia*, 44 L.W. at 5240.

to their education and that the right could not be withdrawn, even temporarily, absent minimal due process protections.

The right involved in this case is the right to liberty. While the right has not been defined with exactness:

> In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499-500; Stanley v. Illinois, 405 U.S. 645.
>
> *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).
>
> Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.
>
> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The right to be free from unjustified physical assaults fits that definition. The liberty which was lost by the Petitioners is so basic to our society that the Fourth Amendment is its principal guarantor. In *Schmerber v. California*, 384 U.S. 757, the Court declared:

> The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state.
>
> *Id.* 384 U.S. at 767.

And in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said:

> Even a limited search of the outer clothing for weapons constitutes a severe, though brief intrusion upon cherished personal security and it must surely be an annoying frightening and perhaps humiliating experience.
>
> *Id.* 392 U.S. at 24-25.

The intrusions upon the physical integrity of the Drew Junior High School students were severe, annoying, frightening and humiliating.[19] "Liberty," as a broad concept, or as a Fourth Amendment concept, is certainly the right which was lost by the Petitioners and their class. Cf. *Baker v. Owen*, 395 F. Supp. 294, 301 (M.D. N.C.) (three-judge court), aff'd ____ U.S. ____, 96 S.Ct. 210 (1975).

The decision below refused to view the Petitioners' claims as ones involving liberty. Instead, the Court concluded that paddling involved no "deprivation of a property interest or denial of a claim to education" and called paddling "a much less serious event in the life of a child than . . . a suspension. . . ." *Ingraham v. Wright*, 525 F.2d at 919 (App. 189). The Court applied "the 'grievous loss' standard" to the facts and concluded that the paddlings at Drew did not subject students to a "grievous loss" for which constitutionally mandated

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[19]The definition of "severe" corporal punishment in a due process context differs slightly from "severe" in an Eighth Amendment sense. See note 7, *supra*. Obviously, the excessive conduct which is the subject of that argument cannot be legitimatized by a prior hearing.

In the due process sense, "severe" corporal punishment means the infliction of bodily pain by an instrument designed to cause such pain. That definition is drawn from the facts of this case. We do not include a brief hand spanking or a slapped face within the definition of "severe" corporal punishment. But one "lick" with a paddle, an instrument designed for the purpose of causing pain, is "a severe though brief intrusion upon cherished personal security." Cf. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968).

procedural safeguards apply. *Id.* 525 F.2d at 918, n. 10.[20] (App. 188).

The erroneousness of that conclusion is immediately apparent when one considers James Ingraham's case. Had he been suspended for a "week and a few days" (App. 79) instead of being driven from school by Mr. Wright's paddle, he would have been entitled to *Goss v. Lopez* due process hearing procedures. The paddling of Ingraham involved both a property and a liberty interest. Under the "property" test of *Goss v. Lopez*, Ingraham's loss of schooling reached constitutional proportions. An examination of the extent of the losses of liberty incurred by both Petitioners and their class makes it clear that those deprivations were grievous and substantial.[21] Since the dissent to *Goss v. Lopez* characterized suspensions as *de minimus*, we utilize the reasons for that assessment in making our comparison. In *Goss*, Justice Powell noted:

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[20]The "grievous loss" test has no place here for several reasons. First, the interest asserted by the Petitioners primarily involves liberty, not property, and secondly, even if only property rights were involved, the amount of loss is relevant only to the timing and nature of the hearing. "As long as a property deprivation is not *de minimus*," its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, at 575-576. But, as we argue *infra*, under any test, the liberty and property rights lost by the Petitioners merit due process protection.

[21]While we have focused upon the physical integrity guaranteed by "liberty," the psychological harm caused by severe corporal punishment adds to the weight of the loss. The District Court's Order of Dismissal stated: "After having heard the testimony in this case, this Court believes that corporal punishment may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting." The

(continued)

> For average, normal children—the vast majority—suspension for a few days is simply not a detriment; it is a commonplace occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.
>
> *Goss v. Lopez*, 419 U.S. at 598, n. 19 (Powell, J., dissenting).

No one welcomed being paddled at Drew Junior High School. Roosevelt Andrews' testimony about the bathroom paddling of fourteen or fifteen boys by Mr. Barnes makes that clear:

> Q Do you remember how many licks he gave?
>
> A All different kinds of licks. I mean all different kinds in numbers.

(footnote continued from proceeding page)

original Court of Appeals panel decision summed up the testimony of one expert witness on the subject:

> Dr. Scott Kester, an assistant professor of educational psychology at the University of Miami, testified that corporal punishment could damage a child's development by engendering anxiety, frustration, and hostility, or by causing sheer pathological withdrawal or hatred of the school environment. He further commented that since children model their behavior after adults, a child who is corporally punished may learn from this that physical force is an appropriate way in which to handle conflicts. Dr. Kester emphasized that the child who is corporally punished often becomes more aggressive and more hostile than he was prior to his punishment.
>
> 498 F.2d at 264. (App. 172.) See Transcript, pp. 668-769.

Another dimension of the liberty lost by the Petitioners and their class arises from the public nature of the paddlings. For example, Janice Dean's paddling, imposed before 300 students on her first day in school (Tr. 815-816) certainly involves a loss of reputation, honor and integrity amounting to a denial of liberty. *Goss v. Lopez*, 419 U.S. at 574.

> Q Did they say anything?
>
> A Yeah, they say something.
>
> Q What did they say?
>
> A All kinds of stuff. They say—some of them hollering, cry, prayed, and everything else.
>
> (App. 109).

James Ingraham's reputation among his brothers and sisters was long affected by his beating:

> Q Did you tell anybody about it? Did anybody find out about it; any of your friends?
>
> A No.
>
> Q How about your brothers and sisters; did they know about it?
>
> A Yeah.
>
> Q What did they say about it?
>
> A Called me "rain bummy".
>
> Q Was that in reference to your buttocks?
>
> A Yeah.
>
> Q Were they making fun of you?
>
> A Yeah.
>
> Q How did you feel about that?
>
> A I plugged them in their face.
>
> Q You were angry about that?
>
> A Yes.
>
> Q How long did that go on?
>
> A Still going on now.
>
> (App. 79).

Ingraham's scar is visibly before the Court (App. 140). The District Court Judge, observing Daniel Lee's hand, which had been struck by Barnes, commented:

"It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree" (Tr. 483). Roosevelt Andrews' wrist was immobilized for a week (Tr. 307).

Finally, it cannot be said, except for Drew Junior High School, that severe corporal punishment in Dade County Schools was a common occurrence.

These facts undermine the theory that paddling at Drew was a "commonplace and trivial event in the lives of most children." *Ingraham v. Wright*, 525 F.2d at 919. (App. 189). Whatever label one may place on the right to human dignity, one cannot call these assaults on that dignity *de minimus*. They were not "speculative and subjective," *Goss v. Lopez*, 419 U.S. at 598 (Powell, J., dissenting). They were serious, real and objectively assessed by medical records (App. 133-139). If "liberty" means anything, it means that such punishment triggers the protection of the Due Process Clause.

B. The Due Process Which Should Be Applied.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *Goss v. Lopez* noted the flexible nature of due process procedures and recognized the sensitivities surrounding their application to school settings. 419 U.S. at 577-578. The Court's analysis is so apt to the need for hearings in corporal punishment situations that we set it forth verbatim. Substitute severe corporal punishment for "suspension" and the analogy is complete:

> The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.
>
> The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer to untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure

> that an injustice is not done. "[F]airness can rarely be obtained by secret, one-sided determination of acts decisive of rights. . . ." "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Committee v. McGrath, supra, at 170, 171-172, 95 L.Ed. 817 (Frankfurter, J., concurring).
>
> *Id.* 419 U.S. at 579-580.

Unlike an improper suspension, erroneous corporal punishment cannot be undone. Therefore, we deem it essential that *some* opportunity to be heard precede the infliction of bodily pain by an instrument designed to cause such pain. The error of both the majority *en banc* decision and the District Court was that they envisioned a very rigid process. The district judge wrote:

> It seems to this Court that if there is any good purpose to be served by corporal punishment in the schools, such purpose would be long since passed if *formal* notice and hearing were required before a paddling.
>
> (App. 156) (Emphasis supplied).

The *en banc* decision stated:

> It seems to us that the value of corporal punishment would be severely diluted by *elaborate* procedural process imposed by this court.
>
> *Ingraham v. Wright*, 525 F.2d at 919 (App. 189) (Emphasis supplied, footnote omitted).

But due process is not necessarily so elaborate or formal. "[T]he timing and the nature of the hearing

will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. at 579, citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, at 895 (1961).

The original Fifth Circuit panel decision and the opinions of three-judge courts in *Whatley v. Pike County Board of Education*, No. 977 (N.D. Ga. 1971) (unreported), and *Baker v. Owen*, 395 F. Supp. 294 (M.D. N.C. 1975) aff'd ____ U.S. ____, 96 S.Ct. 210 (1975), struck the proper balance.

The *Baker* court considered the matter carefully and decided that a student must be "informed beforehand that specific misbehavior" could result in corporal punishment and that the student must be given some opportunity to tell his side of the story. *Id.* 395 F. Supp. at 302.

The *Whatley* court required that "the student know and understand the rule under which he is to be punished," and if the school officials were in doubt as to who committed the offense, then they must make further inquiry. The original panel decision, quoting from *Whatley*, required that the school officials tell the student what he has done to merit the punishment and at least make "sufficient inquiries" to insure that the student was guilty. *Ingraham v. Wright*, 498 F.2d at 267-268 (App. 176).

None of these procedures are elaborate or formal. They require minimal expenditures of time and effort. Yet they would go far in assuring that the application of physical force to students to discipline or punish them would be carried out fairly, not arbitrarily. No substantial delay would have to occur between the

alleged infraction and the punishment.[22] But taking whatever time is necessary to minimize arbitrariness and capriciousness is a necessary constitutional investment.

The minimal procedures required are:

1. Notice of the Charges and an Opportunity to be Heard.

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950), makes notice and an opportunity for a hearing essential elements of due process. All that is necessary is that "the student just be told what he is accused of doing and what the basis of the accusation is." *Goss v. Lopez*, 419 U.S. at 582. Essential to the notice requirement is some code of discipline so that a student will not be exposed to punishment for conduct which he did not know was improper.

The hearing must be at least an "informal give and take between student and disciplinarian" prior to the imposition of punishment. *Id.* 419 U.S. at 584. No formal rules of procedures should be imposed, but it is

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[22]Some attempts have been made to justify the speedy application of the paddle as a means of relieving a student's anxiety. The less time between the offense and the punishment, the less time to worry about the beating. But the Board Policy mandates an analysis of whether the punishment will change a student's behavior and a pre-paddling conference with the school psychologist or physician if the student had been receiving treatment (App. 130, 132). The informal hearing we suggest would not impose a greater delay than that presumably envisioned by the Board Policy.

See also Florida Attorney General's Opinion 074-256, August 29, 1974, which advises that a teacher must consult with the principal before corporal punishment is imposed. An informal hearing could be held at that time.

essential that the school official "pay careful adherence to procedural fairness and reasonableness" because young schoolchildren are limited in their ability "to protect themselves against charges of misconduct." *Sullivan v. Houston Independent School District*, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

2. A Neutral Person Should Decide the Need for Punishment and Impose It If Necessary.

The importance of having a neutral person to decide the need for punishment and impose it is necessary is twofold. First, it protects a student against harsh treatment inflicted in anger and hostility. The Court has required similar safeguards in other cases. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974). The record in this case reflects the danger of the disciplinarians being judge and jury. Too often they became angry and vindictive, imposing inordinate punishment in their fury (App. 73-75).

Secondly, a neutral person will be more likely to weigh the facts informally presented to him and arrive at an unbiased conclusion. Neutral and detached decision making is an important Fourth Amendment requirement. *Gerstein v. Pugh*, 420 U.S. 103 (1975). It is equally important in civil decision making.

If severe corporal punishment is to be inflicted at all, the Petitioners and their class are entitled to those rudiments of due process.

III.

THE AVAILABILITY OF STATE REMEDIES DOES NOT PRECLUDE FEDERAL COURT RELIEF FOR DEPRIVATIONS OF FEDERAL CONSTITUTIONAL RIGHTS BY PERSONS ACTING UNDER COLOR OF STATE LAW.

The Respondents, citing *Paul v. Davis*, ____ U.S. ____, 47 L.Ed.2d 405 (1976), have argued that the availability of state tort remedies should preclude federal court relief under Title 42 U.S.C. §1983. Brief in Opposition to Petition for Writ of Certiorari, p. 4. Since we anticipate that point being raised in their main brief, we address it now.

The easy doctrinal answer to the Respondents' contention is *Monroe v. Pape*, 365 U.S. 167 (1961):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.
>
> *Id.* 365 U.S. at 183.

See also *McNeese v. Board of Education*, 373 U.S. 668, 671-672 (1963).

The federal remedy in *Monroe v. Pape* was sought for a deprivation of Fourth Amendment rights. Neither *Paul v. Davis*, ____ U.S. ____, 47 L.Ed.2d 405 (1976), nor *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d ____, 44 L.W. 4820 (1976), erode the principles of *Monroe v. Pape*. In *Paul*, Mr. Davis' claim was based on a loss of liberty (his interest in not being defamed)

absent a hearing. Police officer Bishop's loss of liberty also involved a claimed damage to reputation and a termination of employment based on false reasons. *Bishop v. Wood*, 44 L.W. at 4822. The Court rejected their liberty claims. Since the Constitution contains no specific prohibitions against defamation or the improper loss of employment, no specific constitutional rights were lost. The Court rejected the theory that the procedural guarantees of the Due Process Clause "extend[s] . . . a right to be free of injury wherever the state may be characterized as the tortfeasor." *Paul v. Davis*, 47 L.Ed.2d at 413. Therefore, the Court concluded that the claimants were not asserting denials of any constitutional rights.

But the Constitution does contain explicit guarantees against cruel and unusual punishment and the invasion of one's physical integrity. The Eighth and Fourth Amendments are the sources of the Petitioners' claims. They are seeking redress for acts depriving them of rights "protected and secured by the Constitution . . . of the United States." Cf. *Screws v. United States*, 325 U.S. 91, 108-109 (1945) (plurality opinion); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390-392 (1971). Therefore, their claims are governed by the doctrine of *Monroe v. Pape*. The state law remedies are irrelevant when specific constitutional guarantees have been violated by persons acting under color of state law.

A final word. We are aware of the admonition of *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), cautioning against federal court intervention in "conflicts which arise in the daily operation of school

systems and which do not directly and sharply implicate basic constitutional values." But cases like this one do not arise daily. The events at Drew Junior High School were unique. The actions of the school officials did sharply conflict with basic constitutional concepts. Reversing the Court of Appeals decision will not offend notions of federalism, nor will it create a wellspring of future federal litigation. A reversal will "provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth." *Paul v. Davis*, 47 L.Ed.2d at 433-434 (Brennan, J., dissenting).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that the decision of the Court of Appeals should be reversed.

The Court should conclude that severe corporal punishment may violate the Eighth Amendment and that on the evidence offered by Ingraham and Andrews, a jury could decide that each of them suffered a deprivation of their constitutional rights. Therefore, Counts One and Two of the Complaint should be remanded to the District Court for trial.

The Court should also find that the imposition of severe corporal punishment must be preceded by informal due process procedures. Since the District Judge dismissed the Eighth and Fourteenth Amendment claims for declaratory and injunctive relief at the close

of the Petitioners' evidence, the District Court, on remand, should be ordered to vacate his Rule 41(b) dismissal of Count Three of the Complaint and consider those claims in light of this Court's reversal of the *en banc* Court of Appeals decision.

Respectfully submitted,

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